

# Decision making and best interests: Reaching the decision that is right for the patient

Dr Chris Danbury  
Consultant Intensive Care Physician

Expert witness in *Aintree v James*



# Intensive Care

# My unit

1000 patients per year

60% Emergency

80% Lack Capacity



# Conflict

# Conflict

- 70% of ICU staff members have reported conflicts in intensive care – staff/staff and staff/family
- Families, ICU physicians and nurses report conflicts in up to 80% of patients requiring a treatment-limitation decision

Azoulay E et al “Prevalence and Factors of Intensive Care Unit Conflicts: The Conflicus Study.”  
*American Journal of Respiratory and Critical Care Medicine* 180, no. 9 (2009): 853–60.

# Decisions

- Few patients die on ICU unexpectedly
- 70% of patients who die on ICU have some form of limitation of treatment

Sprung, Charles L, Simon L Cohen, Peter Sjokvist, Mario Baras, Hans-Henrik Bulow, Seppo Hovilehto, Didier Ledoux, et al. "End-of-Life Practices in European Intensive Care Units: The Ethicus Study." *JAMA* 290; no. 6 (August 13, 2003): 790–797. doi:10.1001/jama.290.6.790.

# My Unit

- 1000 patients per year
- Mortality 20%
- 200 deaths per year
- 140 after withholding or withdrawing life-sustaining treatment
- 112 of those decisions have some degree of conflict

# Demanding / Refusing Treatment



# Demanding / Refusing Treatment

## Demanding:

Ultimately, however, a patient cannot demand that a doctor administer a treatment which the doctor considers is adverse to the patient's clinical needs.

## Refusing:

I am therefore entirely satisfied that Ms B is competent to make all relevant decisions about her medical treatment including the decision whether to seek to withdraw from artificial ventilation.

R (on the application of Burke) v General Medical Council.  
[2005] EWCA 1003

Ms B v. An NHS Hospital Trust  
[2002] 2 All E.R. 449

# Demanding / Refusing treatment

On an application under this Act, therefore, the court has no greater powers than the patient would have if he were of full capacity. The judge said: “A patient cannot order a doctor to give a particular form of treatment, although he may refuse it. The court’s position is no different”.

Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67

# Agreement

If, at the end of the medical process, it is apparent that the way forward is finely balanced, or there is a difference of medical opinion, or a lack of agreement to a proposed course of action from those with an interest in the patient's welfare, a court application can and should be made.

An NHS Trust & Ors v Y & Anor [2018] UKSC 46

# Alternative Dispute Resolution

Disputes in Intensive Care usually due to  
misunderstanding

# Prospect Theory and Framing

# Framing

Participants were asked to choose between two treatments for 600 people affected by a deadly disease. Participants were first asked to choose between 2 different options:

- If Program A is adopted, then 200 people will be saved (**72%**)
- If Program B is adopted, there is a  $1/3$  probability that 600 people will be saved and a  $2/3$  probability that no people will be saved. (**28%**)

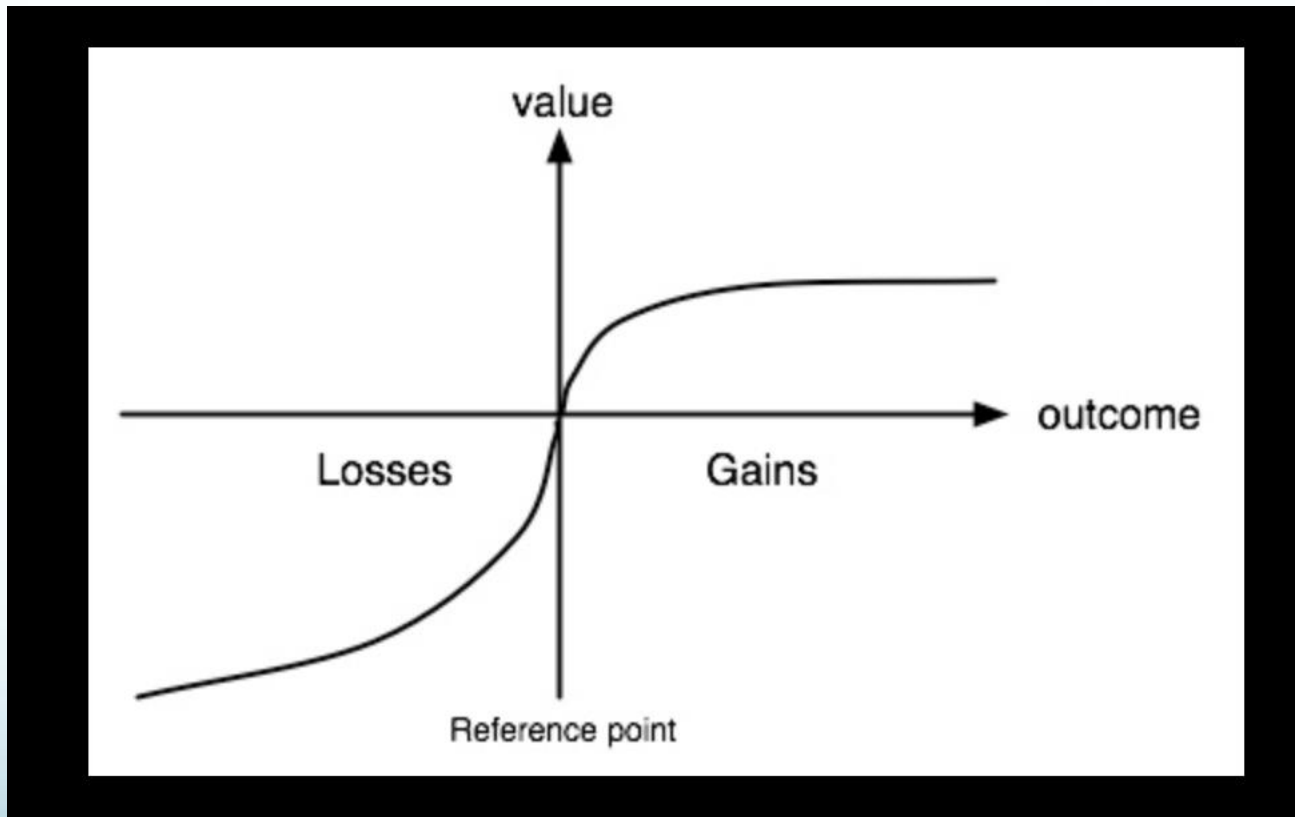
The same participants were then asked to choose between Program C and D

- If Program C is adopted, 400 people will die (**22%**)
- If Program D is adopted, there is a  $1/3$  probability that 600 people will be saved and a  $2/3$  probability that no people will be saved (**78%**)

# Framing

- Treatment options A (72%) & C (22%) are the same
- Treatment options B (28%) & D (78%) are the same

# Prospect Theory



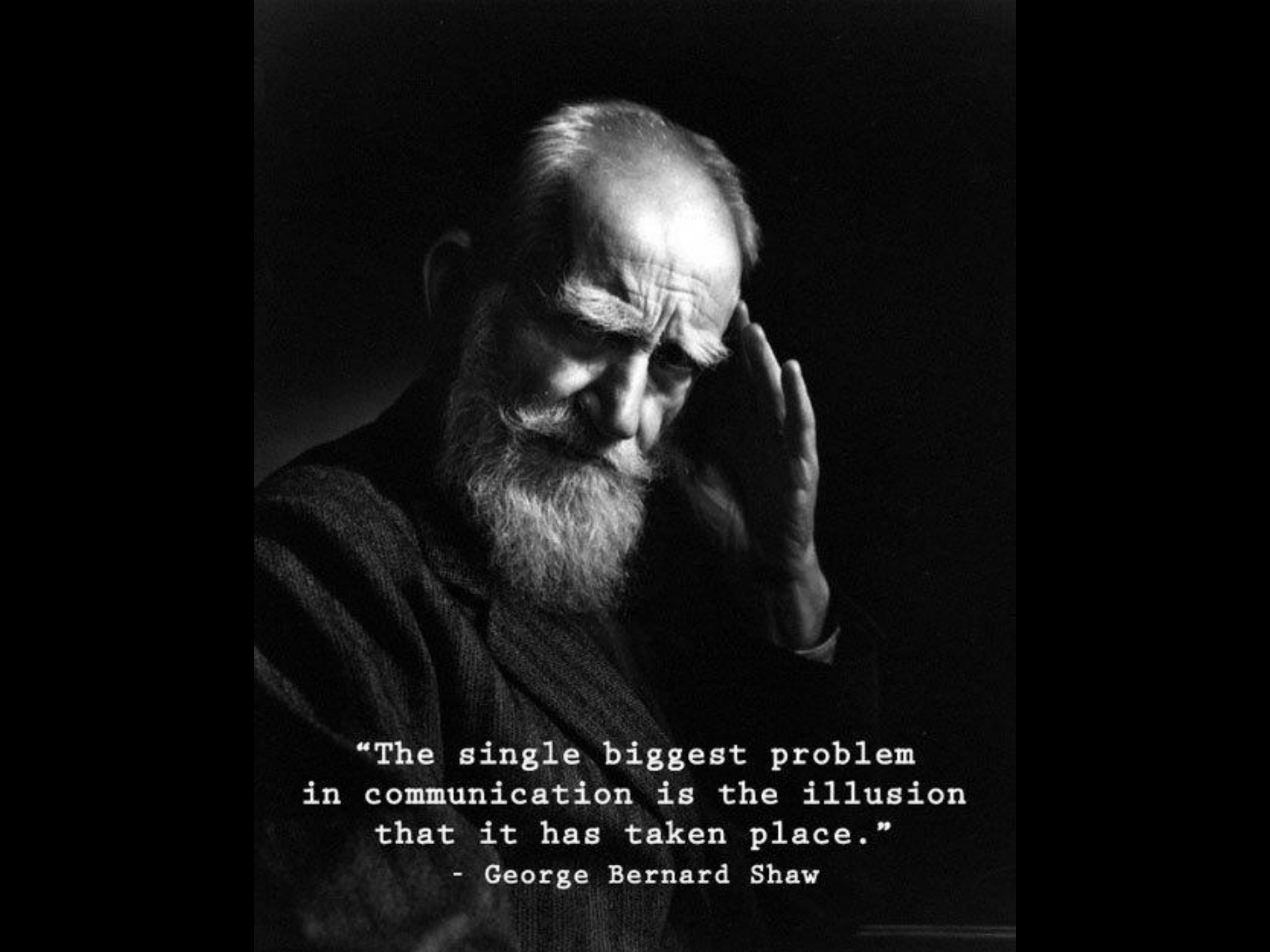


# Cognitive Biases

- Optimism bias - The tendency to be over-optimistic, overestimating favourable and pleasing outcomes. (Relatives)
- Backfire effect - The reaction to disconfirming evidence by strengthening one's previous beliefs. (Relatives/Clinicians)
- Curse of knowledge - When better-informed people find it extremely difficult to think about problems from the perspective of lesser-informed people. (Clinicians)

# Cognitive Biases

- Reactance - The urge to do the opposite of what someone wants you to do out of a need to resist a perceived attempt to constrain your freedom of choice.
- Groupthink - desire for harmony or conformity in the group results in an irrational or dysfunctional decision-making outcome.
- Bias blind spot - The tendency to see oneself as less biased than other people.

A black and white portrait of George Bernard Shaw, an elderly man with a full white beard and hair, looking down and to the right with his hand near his face. The lighting is dramatic, highlighting his features against a dark background.

“The single biggest problem  
in communication is the illusion  
that it has taken place.”

- George Bernard Shaw

# Mediation

The process by which someone tries to end a disagreement by helping the two sides talk.

# Evidence

- The only 2 areas not considered to be appropriate for mediation are:
  - Whether an adult lacks capacity
  - Whether abuse has occurred.
- Premediation meetings are key
- Understanding of both of law and medicine by the mediator - Specialised training needed.
- Mandatory mediation should be limited to attending the mediation, not required participation.

# Evidence

- Cost - Cheaper
- Time - Faster
- 60 – 90% settle
- 90% of participants found the experience useful
- Parallel Track to litigation



# Consequences

Failed Mediation

Court of Protection decision

The day after!

